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The Supreme Court of the United States

OCTOBER TERM, 1941.

JOHN FOWER, W. J. CORDNER, M. E. KARTCHNER, JR., and RAY E. LOVELESS,
Petitioners and Plaintiffs Below,
vs.
PROVO BENCH CANAL AND IRRIGATION COMPANY, a Corporation, and Its Board of Trustees, RAY V. WENTZ, A. G. KEETCH, LEONARD WALKER, JOHN STRATTON, EMERY McKELLIP, NIELS ANDERSON, and A. LOWE,
Respondents and Defendants Below.

Petition for Writ of Certiorari to the Supreme Court of Utah

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully show:

That they, and each of them, are and at the time the above entitled action was commenced were the owners of shares of capital stock of the respondent and defendant below, Provo Bench Canal & Irrigation Company, a mutual irrigation company, hereinafter referred to as the "Company," organized and existing under the laws of the State of Utah. The personal respondents and defendants below are and at the time of the commencement of this action in the court below were the trustees of the respondent com-

pany. The company was organized February 26, 1887, for the object or purpose of conveying "water from Provo River to Provo Bench and lands adjacent thereto and to regulate and control the same for the purposes of irrigation. (R. 39). The life of the corporation under the original articles was for a term of twenty-five (25) years. On January 8, 1910 the articles of incorporation were amended so that the life of the company was extended to fifty (50) years. (R. 42). On January 9, 1937, the articles of incorporation of the company were extended to one hundred (100) years from the date of its original incorporation. (R. 44). The authorized capital stock of the company is three thousand (3,000) shares, (R. 43), but at the time this action was commenced and immediately prior thereto there were outstanding and fully paid up one thousand nine hundred fifty-four (1,954) shares of the capital stock of the defendant company. (R. 21). On May 7, 1938, a meeting of the stockholders of the company was held, at which meeting a resolution was passed by a majority of the stockholders of the company authorizing and directing the board of trustees of the company to subscribe for two thousand (2,000) shares of the capital stock of the Provo River Water Users' Association, hereinafter referred to as the "Association." (R. 53). The vote on the resolution was one thousand twenty-eight and eighty-nine hundredths (1,028.89) shares of the capital stock of the company voting in favor thereof and six hundred sixty and ninety-three hundredths (660.93) voting against the adoption of the resolution. (R. 45). At the same meeting a resolution was passed by a vote of one thousand twenty-nine (1,029) shares of the company voting in favor of and one-half (½) share voting against a resolution to amend the articles of incorporation of the company. (R. 45).

By the resolution so passed the objects and purposes of the company were enlarged to the effect that the company might:

> "own, acquire by purchase, or otherwise, dams, reservoirs, canals and other irrigation works,

water and water rights and/or lands, easements in lands and other property incidental or necessary to accomplish the objects and purposes hereinabove and hereinafter enumerated, and to divert, control, and distribute the waters owned or held by it for the use of its stockholders, and to do any and all things necessary, convenient, or incidental to the enjoyment of such objects and purposes;

"To enter into contracts with the United States or with other parties for the purchase, acquisition, or lease of water rights, and lands, easements in lands, dams, reservoirs, canals, and necessary irrigation works, or parts thereof, and other property, incidental to or necessary for the full enjoyment thereof, and to contract with the United States or other parties for the construction of such works;

"To mortgage, pledge or otherwise encumber its property, both real and personal, to secure the payment of its debts and obligations;

"To subscribe for, purchase or otherwise acquire and own stock, in other corporations organized or to be organized, and to purchase its own capital stock and in carrying out its contracts with the United States, or any department thereof, or with other persons, firms, or corporations in the exercise of its powers herein granted, to make and deliver its promissory notes, guarantees, mortgages and other obligations in such form and on such terms and conditions as to its Board of Trustees may be or appear to be necessary and proper, and to secure, guarantee and become surety for the payment or the performance thereof, or of any contract, promissory note, or other obligation that may be or has been entered into with the United States or with any other person, firm, or corporation in which this corporation has

acquired, by subscription, or otherwise, shares of stock, water or water rights and other rights incidental thereto;

"This corporation in addition to the powers herein enumerated, shall have the power to do any and all things necessary or proper in the carrying out of its business as an irrigation corporation, limited only by the laws of the State of Utah and of the United States of America. . . . That the capital stock of this corporation shall be assessable for any and all corporate purposes." (R. 46-47).

The resolution passed by a majority of the stockholders of the company with respect to entering into a contract for the purchase of additional water provides:

"That the Board of Trustees of the said Provo Bench Canal & Irrigation Company be, and it is hereby authorized and directed to subscribe for 2000 shares of the capital stock of the Provo River Water Users' Association, a corporation, to the end that this corporation may acquire adequate supplementary water supply for the irrigation of the lands of its stockholders from what is commonly known as the Deer Creek Division of the Provo River Project, and

"BE IT FURTHER RESOLVED that the said Board of Trustees be, and it is hereby authorized to enter into necessary contracts with the said Provo River Water Users' Association and to provide for the payment therefor in accordance with the requirements and regulations of the said Provo River Water Users' Association, and according to the requirements of the United States, with which the said Provo Water Users' Association has entered into contracts for the construction of what is commonly known as the Deer Creek Division of the Provo River Project by which said supplementary water supply can

be obtained, and BE IT FURTHER RESOLVED that said Board of Trustees be authorized to do any and all acts and things necessary to subscribe for and acquire said stock in the Provo River Water Users' Association, and to pay for the same." (R. 45).

It is made to appear by the terms of the proposed contract that the Association was organized, among other things, for the purpose of contracting with the United States of America for the construction of certain irrigation and reclamation works in Utah, for the development, storage, diversion and beneficial use of the waters of the Provo, Weber and Duchesne rivers, and their tributaries, for irrigation, municipal, industrial and other purposes, and for the repayment of the costs of construction of such works by the Association from money collected from those who purchase the water so developed and stored. (R. 50-51).

The contract which the company intends to enter into with the Association contains, among others, the following provisions:

"The company desires to secure an additional water supply for the use of its stockholders and others through the purchase of shares of stock in the Association and through the construction of said works." (R. 52).

"The company agrees to and does hereby subscribe for 2000 shares of the stock of the Association and agrees to pay the Association the full purchase price of said shares of stock. The company agrees to pay any and all assessments and/or calls assessed and levied by said Association from time to time against said shares of stock of the Association owned by the company, including such deficiency assessments on account of the anticipated and/or established failure of some other stockholder of the Association to pay assessments and/or calls when due as may be necessary within

the limitation provided for in Article 14 hereof, to enable the Association to pay in full when due the Association's indebtedness to the United States under said Association-Government contract." (R. 53).

"The company shall pay as the purchase price of the shares of stock in the Association herein subscribed for that proportion of the total sums and charges required to be paid by the Association to the United States under said Association-Government contract for the construction of the works therein described and provided for, as computed and determined by the secretary in conformity with the provisions of Article 22 of the Assocation-Government contract, that the number of shares of Association stock subscribed for by the company shall bear to the total number assessable at the time the construction of the works described in Article 2 hereof is authorized by the secretary unless permitted by the secretary to use a different number of shares as the basis of computation, in which event the purchase price of shares of stock will be that proportion which the number of shares of stock subscribed for by the company shall bear to the total number of shares of stock outstanding and assessable at the time such permission is given. In case doubt should arise as to the amount of the purchase price herein assumed by the company, the matter shall be referred to the secretary, whose finding shall be final and binding on the parties to this agreement." (R. 53).

"The sums or amounts to be paid under this contract (including deficiency assessments as stated in Article 8) as charges due the Association are to be paid by the company in full without deductions on account of the failure of some of the stockholders of the company to pay assessments and/or calls when due, and the company agrees to levy

and collect such deficiency assessments (to cover estimated and/or established deficiencies) as may be necessary to enable the company to pay such sums or amounts in full when due." (R. 54).

"The company in the distribution of the water supply acquired hereunder shall comply with the provisions of the Act of June 17, 1902 (32 Stat., 388) and acts amendatory thereof or supplementary thereto, particularly those of the Warren Act of February 21, 1911 (36 Stat. 925) and regulations of the United States applicable thereto. and shall not furnish or deliver to any one landowner water in excess of an amount sufficient to irrigate 160 acres of irrigable land. . . . The basis, the measure and the limit of the right of the company to use of said water acquired through its subscription for shares of stock of the Association shall rest perpetually in the beneficial application of the same. The company shall cause said water to be put to a beneficial use in accordance with the law." (R. 54-55).

"The company agrees to pay those operation and maintenance assessments levied by the Association on the shares of stock owned by the company in the Association, including deficiency assessments as may be necessary to pay in full the operation and maintenance expenses incurred by the Association in operating and maintaining said work and other works otherwise acquired, owned, controlled and/or operated by the Association, except as to the Provo Reservoir Canal enlargement." (R. 57).

"Anything herein to the contrary notwithstanding, it is agreed that the total aggregate liability of the company for payment under the terms of this contract:

(a) To the Association, for the purchase price of the stock of the Company in the

Association shall not exceed the sum of $152,000; and

(b) To the Association, on account of the default of some other stockholders in the payment of purchase price of the stock of such other stockholder in the Association shall not exceed the sum of $53,200." (R. 57-58).

"All moneys payable hereunder by the Company to the Association on account of (a) the purchase price of the stock of the Company in the Association, and (b) of the default of some other stockholder in the payment of the purchase price of the stock of such other stockholder in the Association, shall be paid by the Company to the Association and the United States jointly." (R. 58).

"In order to protect, secure, and insure the Association in the payment by the Company of any and all sums of money to become due to the Association under the terms of this contract, the Company agrees to make, execute, and deliver to the Association, its mortgage, in a form and containing such terms and conditions as are acceptable to the Association, covering all the lands, premises, water, water rights, water filings, rights of way, reservoir rights, buildings, structures, improvements, dams, pipe lines, flumes, conduits, ditches, canals, reservoirs, easements, water appropriations, franchises and appurtenances now owned, used, occupied, enjoyed, or possessed by the Company." (R. 59-60).

"The Company shall arrange to operate and maintain, without cost or expense to the Association, any and all canals and facilities (other than the works provided for in Article 2 hereof) necessary to take and utilize the water to which the Company is entitled under and by virtue of this subscription." (R. 59-60).

That on May 21, 1938, the petitioners herein, as plaintiffs below, brought an action in the district court in and for

Utah County, State of Utah against the respondents here and defendants in the court below, in which suit the petitioners herein sought to have declared null and void the attempt to amend the articles of incorporation of the Company, for the reason that a majority of the sockholders of the Company were without power to make such amendment to the articles of incorporation or to authorize the Comapny to enter into the proposed contract over the objections of a minority of the stockholders of the Company. In that action the facts above mentioned were in substance alleged in the complaint so filed. (R. 1 to 19). It was also alleged in the complaint so filed that petifioners here, plaintiffs below

> "and each of them, by reason of their ownership of shares of capital stock in the defendant company have and claim to have sufficient water with which to irrigate their lands and to provide for their needs, and each of their needs, and they, and each of them, will derive no substantial benefit from the purchase of additional water rights which it is proposed that the defendant, Provo Bench Canal & Irrigation Company, purchase pursuant to the resolution hereinbefore set out and the adoption of the proposed amendments to the Articles of Incorporation of the defendant company." (R. 14).

> "That if the Articles of Incorporation of the defendant company are amended as proposed, its stock will be rendered assessable and it will be permitted to engage in business and ventures not contemplated by and contrary to the contract entered into by its incorporators and their successors, and in violation of the provisions of Article I, Section 18, of the Constitution of Utah and Article I, Section 10, of the Constitution of the United States." (R. 15).

> "That if the defendants (in the court below, respondents here) enter into a contract as proposed

by Resolution above mentioned, plaintiffs and other stockholders of defendant company similarly situated will suffer irreparable injury, and likewise if the Articles of Incorporation are amended in the manner proposed as hereinbefore set out, plaintiffs (petitioners here) and other stockholders of defendant company similarly situated will suffer irreparable injury." (R. 15).

"That if the Articles of Incorporation of the defendant company are amended in the manner proposed as hereinbefore alleged, the defendant will, unless restrained and prohibited by this court, engage in a business and enterprise not contemplated by and contrary to the purpose for which said defendant company was organized, towit, in the business of buying and selling water rights, lands, water works, constructing dams, ditches, canals, reservoirs and other water works, will enter into a contract or contracts guaranteeing the payment of obligations of other corporations, particularly the obligations of the Provo River Water Users' Association, will incumber and otherwise render plaintiffs' stock liable for the payment of the cost and expenses of such undertakings and will levy assessments on plaintiffs' stock for the payment thereof." (R. 16)

In their prayer for relief the plaintiffs, petitioners here, prayed, among other things:

1.

"That the resolution purporting to authorize the Board of Trustees of the defendant, Provo Bench Canal & Irrigation Company, be declared null and void and that such resolution does not give said Board of Trustees power or authority to enter into a contract to purchase 2000 or any other number of shares of stock of the Provo River Water Users' Association." (R. 16).

2.

"That a majority of the stockholders of defendant

corporation are, and at the time of meeting of its stockholders, . . . were without power or authority to direct or authorize the Board of Trustees of defendant Provo Bench Canal & Irrigation Company to subscribe for stock of the Provo River Water Users' Association nor to authorize or empower such Board of Trustees to provide for the payment thereof in the manner attempted by said resolution, or at all, and that such Board of Trustees is, notwithstanding said resolution, without authority to enter into such or a similar contract on behalf of defendant company." (R. 16).

3.

"That the majority stockholders of defendant company are without power or authority to amend its Articles of Incorporation in the manner and to the extent attempted in the proposed amendments set out in this complaint, and particularly are the majority of the stockholders of defendant company without authority to so amend its Articles of Incorporation to permit said defendant company to purchase stock in other corporations and to obligate the defendant company for the payment of the purchase price thereof, or to permit the Board of Trustees or majority stockholders to levy any assessment upon the outstanding fully paid up capital stock of defendant company to pay for the purchase price of shares of stock or additional water rights; that the majority stockholders of defendant corporation are without power or authority to so amend its Articles of Incorporation so as to obligate defendant company by contract or otherwise to guarantee or become surety for the payment or the obligations of the United States or of any person, firm or corporation in which defendant company has acquired by subscription, or otherwise, shares of stock, water or water rights, or to levy any assessment on the fully paid up capital stock

of the defendant company for the payment of the debts or obligations of any person, firm or corporation other than the lawful debts and obligations of defendant company." (R. 16).

4.

"That the defendants in that case, respondents here, be perpetually enjoined from entering into the proposed contract." (R. 17).

That the defendants in that case, respondents here, filed a demurrer to the complaint, which demurrer was overruled, and the defendants in that case filed their answer. In the main the answer admitted the allegations of the complaint. They however alleged that they had no knowledge or information as to whether or not the plaintiffs below, petitioners here, had sufficient water to irrigate their lands, and therefore denied the same, and put them upon their proof. (R. 20). They denied that the amendments of the articles of incorporation of the company in the manner proposed would permit the company to engage in a business or venture not authorized by or contrary to the contract entered into by its incorporators and their successors as contained in the articles of incorporation. (R. 16). They also denied that the proposed amendments to the articles of incorporation or to entering into the proposed contract was in violation of the provisions of

Article I, Section 18, of the Constitution of Utah,
or
Article I, Section 10, of the Constitution of the United States.

(R. 15). They also denied that the petitioners here, plaintiffs below, would be irreparably injured if the Company entered into the proposed contract. (R. 15). To the answer petitioners here, paintiffs below, filed a reply.

There was no controversy concerning the facts at the trial, as the parties entered into a written stipulation as to the facts and the trial court made findings in accordance with the facts so stipulated. The plaintiffs below, petitioners here, offered evidence in support of their allegation that they had a sufficient water supply and would not derive any benefit from the purchase of additional water. The trial court, however, refused to admit such evidence upon the ground that it was immaterial. (R. 61).

Upon the facts so stipulated and found the trial court entered its conclusions of law to the effect that the majority of the stockholders of the Company were without power or authority over the objection of the minority stockholders to amend the articles of incorporation of the Company, by providing that the Company may

"1. (a) Acquire, by purchase, water and water rights.

(b) Enter into a contract for the purchase of water or water rights.

(c) Purchase stock in other corporation.

(d) Deliver its promissory notes, guarantees, mortgages or other obligations for the purpose of acquiring water or water rights.

(e) Become surety for the payment or performance of any contract, promissory note or other obligation for the purchase of additional water or water rights, when the purchase price of such water rights is to be paid for by levying assessments on all of the capital stock of the defendant company." (R. 61).

"2. That a majority of the stockholders of defendant company are without authority to bind the minority stockholders or to authorize the defendant company to enter into a contract for the

purchase of additional water or water rights to be paid for by levying assessments on the stockholders of the Company." (R. 62).

"3. That the defendant company is without authority to enter into the contract set out in the Findings of Fact." (R. 62).

"5. That the amendment of the Articles of Incorporation of the Provo Bench Canal & Irrigation Company in the particulars mentioned in number one of these Conclusions of Law, constitutes a material and fundamental change in the Articles of Incorporation of the defendant company, and as such, constitutes an impairment of the contract entered into by the incorporators of the defendant company, contrary to the provisions of Article I, Section 18, of the Constitution of the State of Utah, and of Article I, Section 10 of the Constitution of the United States." (R. 62).

"6. That if the proposed contract set out in the Findings of Fact is entered into and the terms there carried out, the same would constitute an impairment of the contract entered into by the incorporators of the defendant company and would be in conflict with the provisions of Article I, Section 18, of the Constitution of the State of Utah, and of Article I, Section 10, of the Constitution of the United States." (R. 62-63).

"7. That plaintiffs are entitled to have a decree entered in this cause, enjoining the defendant, Provo Bench Canal & Irrigation Company, from entering into the proposed contract set out in the Findings of Fact herein." (R. 63).

The trial court entered a decree wherein it was ordered, adjudged and decreed:

"1. That the defendants, and each of them, for and on behalf of the defendant, Provo Bench Canal & Irrigation Company, a corporation, are hereby

enjoined from entering into and from performing the contract heretofore set out in the Findings of Fact heretofore made and entered in this cause." (R. 63-64).

The defendants in the court below, respondents here, prosecuted an appeal from the decree so entered to the Supreme Court of the State of Utah, which is the highest court of the State of Utah. By their assignments of error they attack the order overruling the demurrer to the complaint, to the conclusions of law and to the decree. (R. 64-68). The petitioners here, plaintiffs below, by cross-assignments of error, attack the ruling of the trial court in refusing to admit evidence tending to show that plaintiffs below, petitioners here, already have sufficient water to supply their needs and that therefore the purchase of additional water by the Company could be of no substantial benefit to them. (R. 69).

That thereafter the defendants below, respondents herein, filed their printed brief, wherein it was contended that a majority of the stockholders of the Company had authority to amend the articles of incorporation in the manner that they were to be amended under the provisions of

R. S. U. 1933, 18-2-44.

They also argued that the company may, when the articles of incorporation are amended to so provide, purchase stock in the Association pursuant to the provisions of

R. S. U. 1933, 100-1-13.

That thereafter plaintiffs filed their printed brief with the Supreme Court of the State of Utah. In their brief at pages 10 to 38 plaintiffs specifically argued that the enactment of a law permitting the majority stockholders of the Company to amend its articles in the manner proposed constitutes an impairment of the contract contained in the articles of incorporation of the Company, and, as such, offends against

Article I, Section 10 of the Constitution of the United States,

and that if the additional water is purchased by the company and paid for by assessments levied against stockholders of the Company it will result in the confiscation of plaintiffs' property.

Again on pages 39 to 44 of plaintiffs' printed brief they argued that if the proposed contract between the Company and the Association is entered into and its terms carried out it will result in the taking of plaintiffs' property without due process of law and will constitute an impairment of the contract contained in the articles of incorporation of the defendant company. That thereafter a hearing was held before the Supreme Court of the State of Utah, at which hearing the parties presented their points to said Court by oral agreement and thereafter the Supreme Court of the State of Utah, on April 19, 1940, rendered its decision and judgment. (R. 70 to 78). The decisions and judgment of the Supreme Court of the State of Utah reversed the decree and judgment of the district court and in effect held that the majority stockholders of the Company could lawfully amend the articles of incorporation in the manner proposed and that the Board of Trustees of the Company could lawfully enter into the proposed contract for and on behalf of the company and that when such contract was entered into its terms could lawfully be enforced. (R. 78).

That thereafter plaintiffs' timely presented their petition for rehearing to the Supreme Court of the State of Utah. (R. 81-82). Plaintiffs also filed a printed brief in support of their petition for rehearing and specially called the attention of that Court to the provisions of

> R. S. U. 1933, 100-1-14, as Amended by Chapter 130, Page 237, Laws of Utah, 1937,

wherein it is provided that:

> "All water hereafter appropriated for irrigation purposes in works constructed or controlled by the United States shall be appurtenant to specified lands owned or occupied by the person claiming the right to use the water, so long as the water is used beneficially thereon; provided, if for any

reason it should at any time become impracticable to use water beneficially or economically for the irrigation of any land to which the right of the same is appurtenant, said right may, on application to the State engineer, be severed from said land and simultaneously transferred to and become appurtenant to other land without losing priority of right theretofore established, if such change can be made without detriment to existing rights. All changes shall be made only in the manner provided by Section 100-3-3, Revised Statutes of Utah, 1933, as amended by this act, and not otherwise."

Plaintiffs again argued that if the proposed contract was executed and carried out and the petitioners compelled to pay assessments and/or calls on the stock owned by them in the Company, it would in effect constitute a confiscation of their property and property rights. Defendants filed a printed brief in answer to plaintiffs' brief on rehearing and plaintiffs filed a printed reply brief to the answering brief of defendants. That thereafter without further opinion, and on November 12, 1940, the Supreme Court of the State of Utah denied plaintiffs' petition for rehearing. (R. 83). The opinions so rendered by the Supreme Court of Utah are not yet published in Utah Reports but will be found in

101 Pac. (2d) 375.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1.

That the Supreme Court of the State of Utah has decided a Federal question of substance not heretofore determined by this Court and has decided it in a way probably not in accord with applicable decisions of this Court, in the following particulars:

(a) That notwithstanding a mutual irrigation company is organized for the sole purpose of con-

veying water from Provo River to Provo Bench and lands adjacent thereto and to regulate and control the same for the purpose of irrigation, such articles of incorporation may be amended by a majority vote of the stockholders of fully paid up capital stock of the Company so that the Company may, among other things, enter into contracts with the United States or with other parties for the purchase, acquisition or lease of water rights and lands, easements in lands, dams, reservoirs, canals and necessary irrigation works, or parts thereof, and contract with the United States or other parties for the construction of such works, and also

(b) To mortgage, pledge or otherwise encumber its property, both real and personal, to secure the payment of its debts and obligations.

(c) To subscribe for, purchase or otherwise acquire and own stock in other corporations organized or to be organized and to purchase its own capital stock and to make and deliver its obligations, to secure, guarantee and become surety for the payment or performance of any obligations that have been or may be entered into by the corporation in which the Company owns or has subscribed for stock.

2.

That notwithstanding a substantial minority of the stockholders of a mutual irrigation company may have a sufficient water right to supply their needs, a majority of the stockholders may authorize the Board of Trustees of the Company and such board of trustees may enter into and enforce a contract for the purchase of water under a project to be constructed and controlled by the United States, notwithstanding the law of the State of Utah requires that such water be made appurtenant to specified lands, and

notwithstanding the Company owns no land to which the water may be made appurtenant, and also notwithstanding a minority of the stockholders cannot put any part of the purchased water to a beneficial use.

3.

That notwithstanding the objection of a substantial number of minority stockholders of a mutual irrigation company a majority of the stockholders of such company may authorize and the board of trustees may enter into and enforce the performance of a contract for the purchase of additional water to be used for irrigation purposes on the land to which it is to be appurtenant and the purchase price must be paid for, not by the persons owning the land to which the water is made appurtenant, but by assessments levied equally on the stock of the Company without regard to the amount of water, if any, that any given stockholder may be able to beneficially use.

4.

That a majority of the stockholders of a mutual irrigation company may authorize the execution of a mortgage on all of its property as security for the payment of the purchase price of the water for the default of other stockholders who fail to pay for the stock subscribed by them and for the maintenance of the irrigation works necessary to develop the water and the storage of the same, notwithstanding the protesting minority stockholders may be unable to beneficially use any of such water, and notwithstanding some of the protesting minority stockholders may not own or occupy any land to which the water can be made appurtenant.

5.

That a majority of the stockholders of a mutual irrigation company may authorize the execution and enforcement of a contract for the purchase of additional water and the maintenance of a system of water works and enforce the payment of the costs and expenses thereof by the stockholders or suffer their stock to be sold for assessments

without regard to the amount of benefit, if any, derived or to be derived by the various stockholders.

That such is the legal effect of the decree of the Supreme Court of the State of Utah was called to its attention by the plaintiffs both upon the original hearing and in their brief in support of their petition for rehearing, and the contention made that the execution and enforcement of such contract constituted an impairment of the contract of incorporation of the Company and would result in the confiscation of plaintiffs' property.

Such are the reasons which petitioners urge in support of their petition for a writ of certiorari from this Court to the Supreme Court of the State of Utah.

JURISDICTION OF THIS COURT

The date of the judgment and decree to be reviewed is April 19, 1940, (R. 81), to which a petition for rehearing was duly filed and was denied on November 12, 1940. (R. 83). Upon application of petitioners under date of February 5, 1941, Honorable Associate Justice Stanley Reed granted petitioners to March 12, 1941 in which to file petition for writ of certiorari. The statutory provisions which are believed to sustain the jurisdiction of this Court are

Paragraphs A and B of Section 344, Title 28, U.S.C.A.,

whereby it shall be competent for this Court to review and determine any cause wherein a final judgment has been entered in any suit in the highest court of the State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decisions in favor of its validity, and

Paragraph B of Said Section 344, Title 28, U.S.C.A.,

whereby it shall be competent for this Court to review and determine any cause wherein a final judgment has been

entered by the highest court of the State in which a decision could be had where any title, right, privilege or immunity is specially set up or claimed by either party under a statute or the Constitution of the United States. Also under Rule 38, Paragraph 5, Section A of the revised rules of this Court, wherein it is provided that a review on a writ of certiorari may be had where a State Court has decided a federal question of substances not heretofore determined by this Court or has decided it in a way probably not in accord with applicable decision of this Court.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of the State of Utah, commanding that Court to certify and send to this Court a full and complete transcript of the record of proceedings of said Court had in the case numbered and entitled on its docket No. 6133, John Fower, W. J. Cordner, M. E. Kartchner, Jr., and Ray E. Loveless, plaintiffs and respondents, vs. Provo Bench Canal & Irrigation Company, a corporation, and its Board of Trustees, Ray V. Wentz, A. G. Keetch, Leonard Walker, John Stratton, Emery McKellip, Niels Anderson and A. Lowe, defendants and appellants, to the end that said cause may be reviewed and determined by this Court, as provided for by the statutes of the United States, and that the judgment herein of said Supreme Court of Utah be reversed by this Court and the judgment of the district court of Utah County, State of Utah, in said cause be affirmed; and for such further relief as to this Court may seem proper.

JOHN FOWER,
W. J. CORDNER,
M. E. KARTCHNER, JR.,
RAY E. LOVELESS.

By ELIAS HANSEN,
WM. A. HILTON,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF COURT

The opinions of the Supreme Court of the State of Utah are not yet reported in the Utah Reports but are reported in 101 Pac. (2d) 375. They appear in the record filed herewith at pages 70 to 81. The date of the judgment to be reviewed is April 19, 1940 (R. 81) to which a petition for rehearing was timely filed and denied November 12, 1940. (R. 83). Under date of February 5, 1941 Honorable Associate Justice Stanley Reed upon application of petitioners granted them to March 12, 1941 to file petition for certiorari. (R. 93).

II

JURISDICTION OF COURT

The statutory provisions which are believed to maintain the jurisdiction of this Court are Paragraphs A and B of Section 344, Title 28, U.S.C.A. (Judicial Code 237 Amended) whereby it shall be competent for this Court to review and determine any cause where a final judgment has been entered in any suit in the highest court of the State in which a decision in the suit could be had, where is drawn in question the validity of the statute of any State on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity; and Paragraph B of said Section 355, Title 28, U.S.C.A. (Judicial Code 237 Amended) whereby it shall be competent for this Court by certiorari to review and determine any cause where a final judgment has been rendered by the highest court of a State in which a decision could be had where any title, right, privilege or immunity is especially set up or claimed by either party under any statute or the Constitution of the United States. Also under Rule 38, Paragraph 5, Section A of the revised

rules of this Court, wherein it is provided that a review on a writ of certiorari may be had

> "Where a State Court has decided a Federal question of substance not heretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

The petitioners here, plaintiffs below, are stockholders in the Provo Bench Canal & Irrigation Company, respondent here and defendant below, which Company is a mutual irrigation company organized under the laws of the Territory of Utah, on February 26, 1887. That after the organization of the Company the legislature of the State of Utah enacted certain statutes hereinafter specifically referred to, which statutes, when construed and applied as they were construed and applied by the Supreme Court of the State of Utah, constitute an impairment of a contract contrary to the provisions of

> Article I, Section 10 of the Constitution of the United States.

That certain statutes hereinafter referred to enacted by the legislature of the State of Utah, when construed and applied as they were construed and applied by the Supreme Court of the State of Utah and the decree and decision rendered by such Court, constitutes the taking of the property of petitioners herein, plaintiffs below, without due process of law and denies the petitioners the equal protection of the law, contrary to the Fourteenth Amendment of the Constitution of the United States. That the opinion of the Supreme Court of the State of Utah, by its decision rendered herein in ignoring or construing certain acts of the Congress of the United States hereinafter referred to denies to the petitioners herein, plaintiffs below, rights, privileges and immunities claimed by them under certain acts of Congress hereinafter referred to and under the Constitution of the United States. That the decision of the Supreme Court of the State of Utah has decided a Federal question of substance not hereto-

fore determined by this Court and has decided it in a way probably not in accord with applicable decisions of this Court.

STATEMENT OF CASE

The petitioners here, plaintiffs below, are owners in severalty of fully paid up shares of stock in the Provo Bench Canal & Irrigation Company, a respondent herein, defendant below. The other defendants are members of the Board of Trustees of the Company. The respondent company was organized on February 26, 1887. The purpose of the corporation as expressed in its articles of incorporation was to convey water from Provo River to Provo Bench and lands adjacent thereto, and to regulate and control the same for the purpose of irrigation. (R. 40). The articles of incorporation originally made the life thereof twenty-five years (R. 41). In 1910 the articles were amended extending the life of the corporation to fifty years (R. 43). In 1937 the articles of the Company were amended extending its life to one hundred years from and after February 26 1887. On May 7, 1938, (R. 44), at a meeting of the stockholders of the Company a resolution was passed by a majority vote, whereby the Board of Trustees of the Company were directed to purchase for and on behalf of the Company two thousand shares of the capital stock of the Provo River Water Users' Association and to enter into a contract for the purchase thereof according to the requirements of the Association and the regulations of the Department of the Interior of the United States. (R. 45).

At the same meeting a resolution was passed by a majority of the stockholders of the Company to so amend the articles of incorporation that it, among other things, may "acquire and own stock in other corporations organized or to be organized" and "to secure, guarantee and become surety for the payment or the performance of any contract, promissory note or other obligation that may

be or has been entered into with the United States or with any other person, firm or corporation in which this corporation has acquired by subscription or otherwise shares of stock, water or water rights or other rights incidental thereto." (R. 46).

Pursuant to the amendments of the articles of incorporation of the Company and the resolution authorizing and directing the board of trustees to enter into a contract to purchase two thousand shares of stock in the Association, the board of trustees of the Company determined to enter into a contract with the Association (R. 49). The proposed contract contained, among others, the following provisions:

> "9. The Company shall pay as the purchase price of the shares of stock in the Association herein subscribed for that proportion of the total sums and charges required to be paid by the Association to the United States under said Association-Government contract, for the construction of the works therein described and provided for, as computed and determined by the secretary in conformity with the provisions of Article 22 of the Association-Government contract, that the number of shares of the Association stock subscribed for by the Company shall bear to the total number of shares of such stock outstanding and assessable at the time the construction of the works described in Article 2 hereof is authorized by the secretary." (R. 53).
>
> "10. The sums or amounts to be paid under this contract (including deficiency assessments as stated in Article 8) as charges due the Association are to be paid by the Company in full without deductions on account of the failure of some of the stockholders of the Company to pay assessments and/or calls when due, and the Company agrees to levy and collect such deficiency assessments (to cover estimated and/or established defi-

ciencies) as may be necessary to enable the Company to pay such sums or amounts in full when due." (R. 54).

"11. The Company in the distribution of the water supply acquired hereunder shall comply with the provisions of the Act of June 17, 1902 (32 Stat., 388) and acts amendatory thereof or supplementary thereto, particularly those of the Warren Act of February 21, 1911 (36 Stat., 925) and regulations of the United States applicable thereto, and shall not furnish or deliver to any one landowner water in excess of an amount sufficient to irrigate 160 acres of irrigable land. Each subscriber of stock of the Association agrees with the Association and with each other subscriber that the Association may dispose of part of the stock of the Association to parties desiring to use project water for domestic, municipal, and industrial purposes as permitted by the Act of February 25, 1920 (41 Stat., 451), and every share of Association stock shall be entitled annually (annually for this purpose shall be the yearly period from November 1 of each year to October 31 of the following year) to its pro rata share (but not exceeding one acre foot of water per share annually measured at the Reservoir, as also provided by the Articles of Incorporation of the Association) of the water developed by this project and in the use of the project works, it being by this project and in the use of the project works, it being agreed that the project works contemplated to be constructed and acquired pursuant to said Association-Government contract are the only practicable source of water supply for those organizations participating in the project pursuant to the Act of February 25, 1920. (41 Stat., 451) and that the delivery and use of such pro rata share of the water of such users shall not be deemed less beneficial nor shall it be deemed

detrimental to the water service for irrigated lands serviced by the project, notwithstanding that shortages in supply are expected at times.

The project water in any such annual period available in excess of a supply of one acre foot per share of Association stock may be disposed of by the Association to shareholders or others subject to the approval of such disposition by the secretary. The rights of the Company and its assigns hereunder are subject to the provisions of Section 13 of the Boulder Canyon Project Act, approved December 21, 1928, (45 Stat., 1064). The basis, the measure and the limit of the right of the Company to use of said water acquired through its subscription for shares of stock of the Association shall rest perpetually in the beneficial application of the same. The Company shall cause said water to be put to a beneficial use in accordance with the law." (R. 54-55).

INDEBTEDNESS ASSUMED

"Anything herein to the contrary notwithstanding, it is agreed that the total aggregate liability of the Company for payment under the terms of this contract:

(a) To the Association, for the purchase price of the stock of the Company in the Association shall not exceed the sum of $152,000; and

(b) To the Association, on account of the default of some other stockholders in the payment of purchase price of the stock of such other stockholder in the Association shall not exceed the sum of $53,200." (R. 57-58).

MANNER OF MAKING PAYMENT

"15. All moneys payable hereunder by the Company to the Association on account of (a) the purchase price of the stock of the Company in the

Association, and (b) of the default of some other stockholder in the payment of the purchase price of the stock of such other stockholder in the Association, shall be paid by the Company to the Association and the United States jointly." (R. 58).

PROVIDE SECURITY

"17. In order to protect, secure, and insure the Association in the payment by the Company of any and all sums of money to become due to the Association under the terms of this contract, the Company agrees to make, execute, and deliver to the Association, its mortgage, in a form and containing such terms and conditions as are acceptable to the Association, covering all the lands, premises, water, water rights, water filings, rights of way, reservoir rights, buildings, structures, improvements, dams, pipe lines, flumes, conduits, ditches, canals, reservoirs, easements, water appropriations, franchises and appurtenances now owned, used, occupied, enjoyed or possessed by the Company." (R. 59).

COMPANY TO OPERATE AND MAINTAIN CANALS

"18. The Company shall arrange to operate and maintain, without cost or expense to the Assosiation, any and all canals and facilities (other than the works provided for in Article 2 hereof) necessary to take and utilize the water to which the Company is entitled under and by virtue of this subscription." (R. 59-60).

The contract also provides that an action shall be brought for a judicial determination of the validity of the contract and that the same is binding on the Company. (R 59). Soon after the action was taken by the stockholders of the Company with respect to the amendments of its articles of incorporation and the passing of a resolution by a majority of its stockholders authorizing and direct-

ing its Board of Directors to enter into a contract for the purchase of additional water, the petitioners here, plaintiffs below, brought an action in the district court of Utah County and sought to enjoin the board of trustees of the Company from entering into the proposed contract on behalf of the Company. They also sought to have the Court declare that a majority of the stockholders of the company were without authority to amend the articles of incorporation in the manner proposed, and likewise that a majority of the stockholders of the company were without authority to authorize the board of trustees of the Company to enter into the proposed contract. (R. 15-16).

They alleged that if the articles were amended in the manner proposed, such amendment would have no force or effect because to give the amendments effect would constitute an impairment of the contract contained in the articles of incorporation of the company, contrary to the provisions of

Article I, Section 10 of the Constitution of the United States. (R. 15).

They also alleged that the purchase of additional water by the Company would be of no substantial benefit to them; that they already had sufficient water with which to irrigate their lands; that they could not beneficially use additional water; that if additional water were purchased their stock in the Company would be assessed for the payment of the purchase price thereof, and that if the contract was executed and enforced they would be irreparably injured. (R. 15). To the complaint the defendants below, respondents here, filed their answer and to the answer the petitioners here, plaintiffs below, filed a reply. The parties entered into a written stipulation whereby most of the facts deemed material were agreed upon. The petitioners here, plaintiffs below, offered to show that they were already supplied with sufficient water with which to irrigate their lands and that they would be unable to beneficially use any additional water. Upon objection of counsel for the respondents here, defendants below, the court sustained the objection. Upon

the facts so stipulated the district court of Utah County made its findings of fact and conclusions of law and entered judgment

> "That the defendants, and each of them, for and on behalf of the defendant, Provo Bench Canal & Irrigation Company, a corporation, are hereby enjoined from entering into and from performing the contract heretofore set out in the findings of fact, heretofore made and entered in this cause." (R. 63-64).

From the judgment so made and entered by the trial court the respondents here, defendants below, prosecuted an appeal to the Supreme Court of the State of Utah. Errors were assigned by them attacking the conclusions of law and decree (R. 65-68). The petitioners here, plaintiffs below, made cross-assignments of error attacking the ruling of the trial court in refusing to permit the petitioners here, plaintiffs below, to show that they already had sufficient water with which to irrigate their lands. (R. 69).

The respondents here, defendants below, filed their printed brief in which they contended that a majority of the stockholders of the Company had authority to amend its articles of incorporation in the manner proposed pursuant to

R. S. U. 1933, 18-2-44,

and that when the articles of incorporation were so amended by a vote of a majority of its stockholders the Company had authority to purchase stock in the Provo River Water Users' Association and to enter into the proposed contract pursuant to the provisions of

R. S. U. 1933, 100-1-13.

(Defendants' and appellants' brief, pages 12 to 26).

To the brief so filed by respondents here, defendants below, the petitioners here, plaintiffs below, filed their brief in which they contended that the proposed amendments to the articles of incorporation constituted a material, radical and fundamental change in the articles

of incorporation of the Company and required the consent of all of the stockholders of the Company. (Brief of plaintiffs' and respondents,' page 10). That the statutory provisions relied upon by defendants and appellants, if given effect as contended for by them, constitute an impairment of the contract contained in the articles of incorporation of the Company contrary to the provisions of

Article I, Section 10 of the Constitution of the United States,

and that if the proposed contract is executed and enforced it will result in the taking of the property of petitioners here, plaintiffs below, without due process of law. (Plaintiffs' and respondents' brief, pages 39 to 44). Petitioners here, plaintiffs below, also contended that the trial court was in error in refusing to permit plaintiffs to show that they, nor either of them, would not derive any benefit by the Company purchasing additional water. (Plaintiffs' and respondents' brief, pages 8 to 10).

To the brief of plaintiffs and respondents the defendants and appellants filed a reply brief in which they contended that the proposed amendments to the articles of incorporation of the Company were not so fundamental as to require the consent of all the stockholders and that Article XII, Section 1, of the Constitution of Utah permitted the legislature to alter, amend or repeal laws relating to corporations. (Reply brief of defendants and appellants, pages 14 to 38).

The Supreme Court of the State of Utah rendered its decision on April 19, 1940, and in the opinion of that Court it was held:

1.

That it was immaterial whether the plaintiffs did or did not derive any benefits from the purchase of additional water, and hence it was not error for the trial court to refuse to admit evidence touching that matter. (R. 77).

2.

That when in 1910 and in 1937 the articles of incorporation of the company were amended extending the life of

the corporation the statutory provisions of the Laws of the State of Utah as then in effect became a part of the articles of the Company and of the contract between the corporation and its stockholders. (R. 71 to 75).

3.

That the stock of the plaintiffs could lawfully be assessed to pay the purchase price of additional water and for the maintenance of the irrigation works constructed by the Federal Government, and that the contract between the Company and the Association was in all respects valid and enforceable. The Supreme Court of the State of Utah reversed the judgment made by the district court and remanded the cause to that court with directions that it amend its conclusions of law and decree to conform to the views expressed in the opinion of the Supreme Court of the State of Utah.

Thereafter petitioners here, plaintiffs below, timely filed their petition for rehearing, together with their written brief in support thereof. In their brief they urged, among other things, that if, as the Supreme Court of the State of Utah had held in its opinion, the laws of the State of Utah in effect when the articles of incorporation of the company were amended became a part of its articles and the contract between the stockholders, by the same token the provisions of

R. S. U. 1933, 100-1-14,

requiring that water appropriated for irrigation purposes in works constructed or controlled by the United States shall be appurtenant to specified lands owned or occupied by the person claiming the right to the use of water also became a part of the articles and the agreement contained therein. That if plaintiffs were required to pay for the purchase price of the additional water and the maintenance of the system constructed by the Federal Government, it would result in the confiscation of their property. That there is both a lawful and practical way whereby stockholders of the Company may acquire Deer Creek water. (Respondents' petition for rehearing and

brief thereon, pages 3 to 17 and pages 22 to 28). That if the proposed contract is entered into and enforced it will result in the confiscation of plaintiffs' property without due process of law and is against public policy. (Respondents' petition for rehearing and brief thereon, page 25).

Respondents herein, defendants below, filed their written brief in answer to the brief filed by the petitioners here, plaintiffs below, and urged that a rehearing should not be granted because the matters urged were not grounds for rehearing, and that the claim that the water must be appurtenant to lands is untenable. (Answering brief of defendants and appellants to plaintiffs' and respondents' reply brief for rehearing and to the brief filed therewith, pages 9 to 15). That under the Acts of Congress particularly the

Warren Act of February 21, 1911,

the United States was authorized to enter into the proposed contract and that the Act of Congress of August 18, 1894 and Congressional Acts supplementary thereto authorized the government to enter into the proposed contract. That before the validity of the proposed contract could be determined the Provo River Water Users' Association and the United States should be made parties to the proceeding. (Answering brief of defendants and appellants to plaintiffs' and respondents' petition for rehearing and to the brief filed therewith, pages 13 to 20). To the brief so filed by the defendants and respondents the plaintiffs filed a reply brief in which it was argued that neither the Association nor the United States was a proper party to the proceedings because the proposed contract was not yet executed and hence they had no legal interest in the cause being litigated, and that if they were necessary parties the opinion of the Supreme Court theretofore rendered should not stand until such time as all necessary parties were before the Court. (Respondents' Reply Brief on Petition for Rehearing, pages 14 to 17). A petition for rehearing was denied without an opinion being written on November 12, 1940.

THE LAWS OF THE STATE OF UTAH AND THE ACTS OF CONGRESS WHICH ARE DEEMED MATERIAL IN THIS CAUSE ARE:

LAWS OF UTAH:

The laws of the Territory of Utah in effect at the time of the incorporation of the Company so far as material here provided:

> "The name of such corporation may be altered. The number of its stockholders, trustees or officers may be changed by making the number greater or less (but in no case shall the number of said trustees or directors be less than three or more than thirteen). The articles of agreement or incorporation may be otherwise changed or amended, provided such amendment does not alter the original purpose of the corporation. But no such change shall be made except by a vote representing at least two-thirds of the capital stock at a stockholders' meeting called for that purpose."
>
> Laws of Utah, 1880, Page 2, and Laws of Utah. 1884, Page 70.

The statutory provisions of the laws of Utah at the time the stockholders directed the amendments to the articles of incorporation so far as material here provide:

> R. S. U. 1933, 18-2-44:
>
> "The articles of incorporation of any corporation now existing or that hereafter may be organized under the laws of this State may be amended in any respect conformable to the laws of this State in such manner and by the vote of such proportion of all or any class or classes of stock as the articles of incorporation may provide; and in case the articles of incorporation do not so provide, by a vote representing at least a majority

in amount of the outstanding stock thereof entitled to vote at a stockholders' meeting called for that purpose as prescribed in Section 18-2-45 . . . and provided further, that the original purpose of the corporation shall not be altered or changed without the approval and consent of all the outstanding stock, but the adding to the purposes or object or extending the power and business of the corporation shall not be deemed a change of the original purpose of the corporation."

In 1919, Laws of Utah, 1919, Section 11, Page 180, the Legislature of Utah enacted a law which is now R. S. U. 1933, 100-1-13, which provides:

"Any irrigation or reservoir company incorporated and existing under the laws of this State may purchase or subscribe for the capital stock of any other similar corporation which at the time of such purchase or subscription shall be or is about to be incorporated; provided, that such purchase or subscription shall be made only when permitted by the articles of incorporation, and such corporations are hereby permitted and authorized to amend their articles of incorporation so as to authorize such purchase or subscription"

In 1905 the

Laws of Utah, 1905, Chapter 108, Section 60, Page 162.

the legislature of the State of Utah enacted a law making it mandatory that water used for irrigation purposes under a Federal project must be made appurtenant to specified land. That law will be found in

R. S. U. 1933 100-1-14, and provides as follows:

"All water hereafter appropriated for irrigation purposes in works constructed or controlled by the United States shall be appurtenant to specified lands owned or occupied by the person claiming the right to use the water, so long as

the water is used beneficially thereon; provided, that if for any reason it should at any time become impracticable to use water beneficially or economically for the irrigation of any land to which the right of the same is appurtenant, said right may, on application to the State engineer, be severed from said land, and simultaneously transferred to and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rights; and in case of such change, the owner of such water right shall execute and acknowledge a proper instrument of transfer describing therein the land from and to which such water is transferred, which instrument shall be recorded in the county recorder's office of the counties in which the lands are situated."

In 1919 the legislature of the State of Utah enacted a law providing for the creation of irrigation districts in order that water might be secured for lands within the districts and so that the lands benefited by the water should pay therefor in proportion to the benefits accruing to the land by the securing of additional water.

Laws of Utah, 1919, Chapter 68, Page 204.

The act was amended in 1929,

Laws of Utah, 1929, Chapter 68, Page 88.

That law was not brought forward into the Revised Statutes of Utah, 1933, but the provisions thereof were expressly retained by

R .S. U. 1933, 8-1-1.

Under the provisions of that act a petition must be signed by fifty or a majority of such land owners or by the Governor, requesting that the district be organized, whereupon notice must be given and an election held to determine whether or not the district shall be organized. If the district is organized at an election held for that purpose, water shall be allotted to the lands within the district and payments made for the water according to

the benefits accruing to the land to which the water is allotted, in conformity with the Act of Congress approved August 11, 1916.

THE LAWS OF THE CONGRESS OF THE UNITED STATES OF AMERICA WHICH ARE DEEMED MATERIAL HERE ARE:

The Act of June 17, 1902, known as the Reclamation Act, contains among other the following provisions:

> "Section 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or territory relating to the control, appropriation, use or distribution of water used in irrigation or any vested right acquired thereto, and the Secretary of the Interior in carrying out the provisions of this act shall proceed in conformity with such laws and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator or user of water in, to or from any inter-State stream or the waters thereof; Provided, That the rights to use water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure and the limit of the right." (32 Stat., Page 390, Section 8, Chapter 1093).

The Warren Act mentioned in the contract, and which must be complied with by the Company, provides:

> Section 1. "That any homestead entryman under the act of June seventeenth, nineteen hundred and two, known as the reclamation act, including entrymen on ceded Indian lands, may at any time after having complied with the provisions of law applicable to such lands as to residence, reclamation, and cultivation submit proof

of such residence, reclamation, and cultivation, which proof, if found regular and satisfactory, shall entitle the entryman to a patent, and all purchasers of water-right certificates on reclamation projects shall be entitled to a final water-right certificate upon proof of the cultivation and reclamation of the land to which the certificate applies, to the extent required by the reclamation act for homestead entrymen; Provided, That no such patent or certificate shall issue until all sums due the United States on account of such land or water right at the time of issuance of patent or certificate have been paid."

Section 2. "That every patent and water-right certificate issued under this act shall expressly reserve to the United States a prior lien on the land patented or for which water right is certified, together with all water rights appurtenant or belonging thereto, superior to all other liens, claims, or interests whatsoever for the payment of all sums due or to become due the United States or its successors in control of the irrigation project in connection with such lands and water rights.

Upon default of payment of any amount so due, title to the land shall pass to the United States free of all encumbrances, subject to the right of the defaulting debtor or any mortgagee, lien holder, judgment debtor, or subsequent purchaser to redeem the land within one year after the notice of such default shall have been given by payment of all moneys due, with eight per centum interest and cost. And the United States, at its option, acting through the Secretary of the Interior, may cause land to be sold at any time after such failure to redeem, and from the proceeds of the sale there shall be paid into the reclamation fund all moneys due, with interest as herein provided, and

costs. The balance of the proceeds, if any shall be the property of the defaulting debtor or his assignee: Provided, That in case of sale after failure to redeem under this section the United States shall be authorized to bid in such land at no more than the amount in default, including interest and costs."

The Act of August 11, 1916,

Chapter 319, 39 Stat. 566, Section 2, provides in part:

"That the cost of constructing, acquiring, purchasing, or maintaining the canals, ditches, reservoirs, reservoir sites, water, water right, rights of way, or other property incurred in connection with any irrigation project under said irrigation district laws shall be equitably apportioned among lands held under private ownership, lands legally covered by unpatented entries, and unentered public lands included in said irrigation district. Officially certified lists of the amounts of charges assessed against the smallest legal subdivision of said lands shall be furnished to the register and receiver of the land district within which the lands affected are located as soon as such charges are assessed; but nothing in this act shall be construed as creating any obligation against the United States to pay any of said charges, assessments, or debts incurred."

It will be observed that by the terms of the proposed contract between the Association and the Company, the Company

"shall comply with the provisions of the Act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof or supplementary thereto, and particularly those of the Warren Act of February 21, 1911 (36 Stat. 925) and regulations of the United States applicable thereto."

While there have been numerous amendments to the acts of Congress above referred to, none of such amendments,

so far as we can ascertain, enlarge, abridge or impair the provisions of the Congressional acts above mentioned.

The respondent here, defendant below, Provo Bench Canal & Irrigation Company, is a mutual irrigation company and in no sense an irrigation district.

IV.

SPECIFICATIONS OF ERROR

1.

The Supreme Court of the State of Utah erred in holding and deciding that the articles of incorporation of the defendant Provo Bench Canal & Irrigation Company may lawfully be amended by a majority vote of its outstanding paid up capital stock, to the effect that said Company may lawfully enter into contracts with the United States or with other parties for the purchase, acquisition or lease of water rights and lands, easements in lands, dams, reservoir, canals and necessary irrigation works or parts thereof, and other property incidental to or necessary for the full enjoyment thereof, and to contract with the United States or other parties for the construction of such works (R. 86).

2.

The Supreme Court of the State of Utah erred in holding ing and deciding that the articles of incorporation of the Provo Bench Canal & Irrigation Company may lawfully be amended by a majority vote of its outstanding capital stock so that such Company may subscribe for, purchase or otherwise acquire and own stock in other corporations organized or to be organized, and to purchase its own stock, especially where the stock to be purchased is not in a corporation similar to the defendant Provo Bench Canal & Irrigation Company. (R. 86).

3.

The Supreme Court of the State of Utah erred in holding and deciding that the articles of incorporation of the

Provo Bench Canal & Irrigation Company may be lawfully amended by a majority vote of its outstanding stock so that its board of trustees may lawfully make and deliver its guarantee, mortgage, and other obligations to secure, guarantee and become surety for the payment or the performance of any contract, promissory note or other obligation that may be or has been entered into with the United States or with any other person, firm or corporation, in which the Provo Bench Canal & Irrigation Company has acquired by subscription, or otherwise, shares of stock, water or water rights, or other rights incidental thereto (R. 86).

4.

The Supreme Court of the State of Utah erred in so construing the provisions of R. S. U. 1933, 100-1-13, so that the articles of incorporation of the Provo Bench Canal & Irrigation Company may lawfully be amended by a vote of the majority of the stockholders, so that such Company may purchase stock or water in the Provo River Water Users' Association, to be paid for by assessments levied against the stock of the Company, and in failing to hold and decide that such an amendment, when so construed, constitutes an impairment of the contract contained in the articles of incorporation of said Company, contrary to Article I, Section 10 of the Constitution of the United States. (R. 86).

5.

The Supreme Court of the State of Utah erred in so construing the provisions of R. S. U. 1933, 100-1-13 so that the articles of incorporation of the Provo Bench Canal & Irrigation Company may lawfully be amended by a majority vote of its stockholders so that such Company may become surety for the payment or performance of any contract, promissory note or other obligation that may be or has been entered into with the United States or with any other person, firm, or corporation in which said Company

has acquired by subscription, or otherwise, shares of stock, water or water rights or other rights incidental thereto, and in failing to adjudge and decree that such an amendment constitutes an impairment of the contract contained in the articles of incorporation of such Company, contrary to Article I, Section 10 of the Constitution of the United States. (R. 87).

6.

That the Supreme Court of the State of Utah erred in holding and deciding that the Board of Trustees of the Provo Bench Canal & Irrigation Company, either with or without authority from a majority vote of its stockholders, may lawfully enter into a contract for the purchase of 2,000 shares (each share to represent one acre foot of water per annum) from the Provo River Water Users' Association for the purchase price not to exceed $152,000, and to pay not to exceed $53,200 on account of the default of some other stockholder in the payment of the stock subscribed by such other stockholders, and to raise the money with which to pay said sums by assessments levied against all of the outstanding stock of the said Company even though some of the stockholders cannot derive any benefit from the stock or water so purchased. (R. 88).

7.

That the Supreme Court of the State of Utah erred in holding and decreeing that the stock of the Provo Bench Canal & Irrigation Company may lawfully be assessed to pay for water purchased by it for irrigation purposes under a project to be constructed and controlled by the United States of America, and hence such water, under the laws of Utah, must be made appurtenant to specified lands. (R. 88).

8.

The Supreme Court of the State of Utah erred in holding and deciding that the Board of Trustees of the Provo Bench Canal & Irrigation Company may lawfully enter

into a contract and enforce the performance thereof by the Company, either with or without a majority vote of the stockholders of said Company whereby the Company becomes obligated to provide for the distribution of the additional water purchased and the costs thereof to be paid by the levy of assessments on all the outstanding stock of the Company. (R. 88).

9.

The Supreme Court of the State of Utah erred in holding that the Board of Trustees of the Provo Bench Canal & Irrigation Company may lawfully, either with or without authority of a majority vote of the stockholders of the Company, enter into a contract on behalf of the Company, whereby the Company becomes obligated to levy assessments on its stockholders without regard to whether they will or will not derive any benefit from the purchase of the additional water and without regard to whether some of the stockholders do or do not own any land to which the additional water may be made appurtenant. (R. 88).

10.

The Supreme Court of the State of Utah erred in holding and deciding that the Provo Bench Canal & Irrigation Company may lawfully purchase water for irrigation purposes under a project which is being constructed and is to be controlled by the United States of America, through its agent, The Provo River Water Users' Association, in the absence of the Provo Bench Canal & Irrigation Company owning any land to which such water may be made appurtenant, and in light of the provisions of the contract and the Warren Act which preclude the purchase by any one person of more water than is sufficient to irrigate 160 acres of land. (R. 89).

11

The Supreme Court of the State of Utah erred in holding that the Provo Bench Canal & Irrigation Company may,

without the consent of all of its stockholders, levy and collect assessments on all of the stock of the Company to purchase water which must be put to a beneficial use and which will benefit only those stockholders who are in need of additional water. (R. 89).

12

The Supreme Court of the State of Utah erred in holding and deciding that the Provo Bench Canal & Irrigation Company may lawfully, without the consent of all its stockholders, mortgage all of its property and property rights to secure the payment of a water right which must become appurtenant to specified lands of such of its stockholders as may put such water to a beneficial use. (R. 89)

13.

In said suit there was drawn in question the decision of said Supreme Court of the State of Utah sustaining the validity of the amendments to the articles of incorporation of the Provo Bench Canal & Irrigation Company and the proposed contract between the said Company and the Provo River Water Users' Association in this, that if the articles are amended in the manner proposed and the contract entered into and carried out, it will result in the impairment of the contract contained in the articles of incorporation of the Provo Bench Canal & Irrigation Company, contrary to the provisions of Article I, Section 10 of the Constitution of the United States and in depriving the plaintiffs of their property without due process of law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, for which errors plaintiffs pray that the said judgment and decree of the Supreme Court of the State of Utah which became final on November 12, 1940, in the above entitled cause, be reversed and judgment rendered in favor of the plaintiffs.

V.

SUMMARY OF ARGUMENT

POINT I.

The water represented by the shares of stock to be purchased by the respondent Provo Bench Canal & Irrigation Company from the Provo River Water Users' Association, an agency of the United States of America, must be appurtenant to specified lands under both Federal and State law. The capital stock owned by the petitioners herein in the respondent Provo Bench Canal & Irrigation Company is personal property, the equitable title to which is in the owners of the stock; only the legal title being in the Company. Being personal property the stock may not be said to be appurtenant to land, nor may such stock be said to be benefitted by the purchase of additional water.

POINT II.

The adoption of the amendment to the articles of incorporation of the respondent Provo Bench Canal & Irrigation Company by a majority vote of its stockholders, especially when viewed in the light of the contract that the Company proposes to enter into with the Provo River Water Users' Association and to enforce, pursuant to the amendment of the articles of incorporation of the Company, constitutes an impairment of the contract contained in the articles of incorporation of the Company contrary to the provisions of Article I, Section 10 of the Constitution of the United States. This claim was duly set up at the inception of the action in the district court of Utah County, Utah, and in the Supreme Court of the State of Utah, and was by the Supreme Court of Utah decided against the plaintiffs below, petitioners here. Thus a Federal question is presented to this Court.

POINT III.

When the provisions of the laws of the State of Utah relied upon by the respondent Provo Bench Canal & Irrigation Company as the basis for the authority of a majority of the stockholders of that Company to amend its articles of incorporation in the manner proposed and to enter into and enforce the proposed contract, such contract when enforced will result in depriving the petitioners of their property and will deny them the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States. Such question was timely presented in the courts below and decided against the petitioners here, plaintiffs below. In such particular a Federal question is presented here.

POINT IV.

By the construction given by the Supreme Court of the State of Utah to the Reclamation laws of the United States of America the petitioners herein are deprived of their rights and immunities under the Constitution of the United States, namely, the Fourteenth Amendment thereof, in that they will be compelled to pay for the purchase price and the cost and expense of perpetually maintaining and distributing water which they cannot beneficially use and which must be made appurtenant to the lands of others who can beneficially use the same. Such question was duly presented to the court below in that the respondent company by the proposed contract involved in this controversy expressly obligates the Company to comply with the Acts of Congress dealing with Federal irrigation projects.

POINT V.

The decision of the Supreme Court of the State of Utah has decided a question of substance, namely, has given

effect to Acts of Congress touching the Reclamation Laws of the United States, namely, the Reclamation Act of June 17, 1902 (32 Stat. 388), the Warren Act of February 21, 1911 (36 Stat. 925) and the Act of August 11, 1916, Ch. 319, Section 2 thereof, (39 Stat. 506) in a way probably not in accord with applicable decision of this Court, in that by the decision of the Supreme Court of the State of Utah water developed under a Federal project must be paid for not by the persons who will be benefitted thereby, nor in proportion to the benefits derived from the project, nor by persons who can beneficially use the water, nor by persons owning land to which the water may be made appurtenant, but by persons who from time to time owned shares of stock in the respondent company, which is a mutual irrigation company organized under the laws of the State of Utah. The proposed contract between the respondent company and the Provo River Water Users' Association requires the respondent company to comply with the Acts of Congress above mentioned. Thus in such particular a Federal question was timely presented to the courts below, and is reviewable by this Court.

ARGUMENT

POINT I.

The right to the use of water is so unlike other property rights in a number of particulars that it may be of aid at the outset to call attention to some of the laws peculiar to water rights in the Western area of the United States where irrigation is necessary to produce profitable crops. The Constitution of the State of Utah, Article XIV, Section 1, provides:

> "All existing rights to the use of any of the waters of this State for any useful or beneficial purpose are hereby recognized and confirmed."

Revised Statutes Utah, 1933, 100-1-1, as Amended by Laws of Utah 1935, Chapter 105, Section 100-1-1, Page 195, provides:

"All waters in this State whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof."

Revised Statutes of Utah, 1933, 100-1-3, provides:

"Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this State."

This is also required under the Act of Congress known as the

Reclamation Act of June 17, 1902 (32 Stat. 388), Revised Statutes of Utah, 1933, 100-1-4, as Amended by Laws of Utah, 1935, Chapter 104, Section 100-1-4, Page 194, provides in part:

"When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease and thereupon such water shall revert to the public and may be again appropriated as provided in this statute."

Revised Statutes of Utah, 1933, 18-4-7

provides that in the case of full-paid stock, all stock subject to assessments must be assessed equally. Assessments within an irrigation district must be based upon the assessed benefits accruing to each of the various tracts of land irrigated by the water allotted to each tract of land within the irrigation district.

Laws of Utah, 1919, Chapter 68 at Page 112, and Sections 19 and 20 of Chapter 68, Pages 89 and 90, Laws of Utah, 1929, R S. U. 1933, 100-10-11

provides that a water right represented by shares of the stock in an incorporated irrigation company is personal property, while water appurtenant to land is real estate.

Under Federal projects water used for irrigation must be appurtenant to the land. Both State and Federal law make this requirement.

Revised Statutes of Utah, 1933, 100-1-14, as Amended by Laws of Utah, 1937, Chapter 130, Section 100-1-14, Page 237.

The Act of Congress approved June 17, 1902, known as the Reclamation Act (32 Stat. 388), paragraph eight thereof requires that water under a Federal project must be appurtenant to land. When an irrigation district is formed as by law provided water may be allotted to the lands within the district and thus become appurtenant to the lands to which water is allotted.

Laws of Utah, 1919, Chapter 68, Page 204.
Laws of Utah, 1929, Chapter 68, Page 88.

The Act of Congress known as the Warren Act, approved February 21, 1911, Chapter 141 (36 Stat. 925) and the Act of Congress approved August 11, 1916, Chapter 319 (39 Stat. 566) provides for lands within irrigation districts to have water allotted thereto based upon the benefits derived by the land on account of the water so made appurtenant thereto. In a mutual irrigation company such as the respondent Provo Bench Canal & Irrigation Company the equitable title to the water right is represented by the shares of stock and in the stockholders. Only the legal title is in the corporation.

Kinney on Irrigation and Water Rights, 2d Edition, Vol. 3, Sec. 1481, Page 2661.

It follows that a mutual irrigation company may not lawfully dispose of any of the waters, the equitable title to which is in the stockholders, to anyone other than a bona fide stockholder.

McDermott v. Anaheim, Etc., 124 Calif. 112; 56 P. 779.

POINT II.

Ever since the decision rendered in the case of

Dartmouth College v. Woodward, 4 Wheat (U. S.) 518; 4 L. Ed 639

to the present time this Court has adherred to the doctrine that articles of corporations constitute a contract. It is said by the learned author of

Thompson on Corporations, 3rd Ed., Vol. 1, Page 417,

that articles of incorporation constitute a contract in different aspects:

(a) Between the State and the corporation.

(b) Between the State and the stockholders.

(c) Between the corporation and the stockholders.

(d) Between the State and third persons who have dealt with the corporation on the faith of the grant.

(e) Between the stockholders themselves.

In order to lessen the effect of the doctrine announced in the Dartmouth College case a number of States, including Utah, have adopted Constitutional provisions reserving to the State the right to amend or repeal laws relating to corporations.

Article XII, Section 1, of the Constitution of Utah provides:

"Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the legislature, and all corporations doing business in this State, may, as to such business, be regulated, limited or restrained by law."

The effect of the foregoing Constitutional provision and similar provisions in other States have frequently been

before the Courts of last resort. The legal effect of the foregoing provision of the Utah Constitution was before the Supreme Court of the State of Utah in the case of

Gary v. St. Joe Mining Company, 32 Utah 497; 91 Pac. 369; 12 L.R.A. (N. S.) 554.

In that case it is in effect held that the foregoing provision in the Utah Constitution is applicable solely for the benefit of the public and that it does not authorize the legislature to change or authorize the majority or any number less than all of the stockholders of a corporation to amend the articles thereof so as to materially affect the rights of the stockholders among themselves, or between themselves and the corporation.

In Vol. 1, Thompson on Corporations, 3rd Ed., Page 458, Section 364, it is said:

> "However sweeping may be the reserved right of amendment the legislature cannot, by an amendatory act, affect or destroy the rights of stockholders. The reason for this is that the Constitutional provisions against impairing the obligation of contracts, and providing for due process of law and compensation for property all stand between the State and the stockholder"

This is the doctrine announced by this Court in

Greenwood v. Freed Company, 105 U. S. 13; 262 L. Ed. 961.

By a long line of decisions this Court has held that when a question is raised as to the validity of State legislation involving the impairment of a contract, and such question is raised in the State Court a Federal right is involved. In such cases the jurisdiction of this Court does not depend upon the form in which the legislative action is expressed but rather upon its practical effect and operation as construed and applied by the State Court of last resort, and this is true irrespective of the process of reasoning by which the decision is reached or the precise ex-

tent to which reliance is placed upon the subsequent legislation.

McCullough v. Virginia, (Va. 1898) 172 U. S. 102, 116, 117; 19 S. Ct. 134; 43 L. Ed. 382, 387, 388

Houston, etc., R. Co. v. Texas, (Tex. 1900), 177 U. S. 66, 77; 20 S. Ct. 545; 44 L. Ed. 673, 680.

Terre Haute, etc. R. Co. v. Indiana, (Ind. 1904), 194 U. S. 579, 589; 24 S. Ct. 767; 48 L. Ed. 1124, 1129.

Louisiana v. New Orleans, (La. 1909), 215 U. S. 170, 175; 30 S. Ct. 40; 54 L. Ed. 144, 147.

Fisher v. New Orleans, (La. 1910), 218 U. S. 438, 440; 31 S. Ct. 57; 54 L. Ed. 1099

Carondelet Canal & Nav. Co. v. Louisiana, (La. 1914), 233 U. S. 362, 376; 34 S. Ct. 627; 58 L. Ed. 1001, 1006.

Louisiana R. & Nav. Co. v. Behrman, (La. 1914), 235 U. S. 164, 170; 35 S. Ct. 62; 59 L. Ed. 175, 180.

So also when this Honorable Court is called upon in the exercise of its jurisdiction to decide whether State legislation impairs the obligation of a contract, it will determine for itself and upon its own independent judgment whether there is a contract and if so what obligations arose from such contract, and whether any of the obligations thereof have been impaired.

Detroit United Railway v. Detroit, (Mich. 1916), 242 U. S. 238, 249; 37 S. Ct. 87; 61 L. Ed. 268.

Southern Wisconsin Railway v. Madison, (Wis. 1916), 240 U. S. 457, 461; 36 S. Ct. 400, 401; 60 L. Ed. 739.

St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 147; 21 S. Ct. 575; 45 L. Ed. 788, 791.

The petitioners here, plaintiffs below, in their complaint set out in full the original articles of incorporation of the respondent company, the proposed amendments to the

articles of incorporation and the proposed contract between respondent Provo Bench Canal & Irrigation Company and the Provo River Water Users' Association. (R. 2 to 6). They alleged that they would derive no substantial benefit as a result of the proposed purchase of additional water. (R. 14-15); that the stock in the respondent company will be assessed for the payment of the purchase price of additional water and that it would be permitted to engage in a business and venture not contemplated by and contrary to the contract entered into by its stockholders and their successors, and in violation of the provisions of Article I, Section 18 of the Constitution of Utah, and Article I, Section 10, of the Constitution of the United States, (R. 15), and that petitioners here, plaintiffs below, and other stockholders similarly situated will suffer irreparable injury. (R. 15).

Upon the stipulated facts the trial court made its conclusions of law in harmony with the allegations of the complaint. (R. 61-62). It was expressly held by the trial court that if the articles of incorporation of respondent company were amended in the manner proposed and the proposed contract entered into and enforced, it would constitute an impairment of the contract entered into by the incorporation of defendant company and would be in conflict with the provisions of Article I, Section 10 of the Constitution of the United States.

In the proceedings had before the trial court and also before the Supreme Court of the State of Utah petitioners here, plaintiffs below, contended that the contract contained in the articles of incorporation would be impaired in two particulars:

1. That the law as it existed when the corporation was organized required a vote of two-thirds of the outstanding capital stock of the Company, while the amendment to the articles did not have a two-thirds vote in favor thereof.

2. It was further contended that to permit the corporation to purchase stock in the Provo River

Water Users' Association and to require the stockholders of the respondent company to pay for the same would constitute a radical and fundamental change in the articles and result in irreparable injury to the plaintiffs

When the respondent company was organized in 1887 it required a two-thirds vote of the outstanding stock to make an amendment to the articles of incorporation.

Laws of Utah, 1884, Page 701.

In 1905 the law was amended to the effect that in the absence of articles of incorporation providing otherwise, at least a majority amount of the outstanding stock was necessary to amend the articles of incorporation.

Laws of Utah, 1905, Chapter 30, Page 27.

At the time of the incorporation of respondent company there was no law permitting one company to purchase stock in another company. In 1919 the legislature of Utah enacted a law permitting an incorporated irrigation company to purchase capital stock in another similar corporation.

Laws of Utah, 1919, Section 11, Page 180.

That the claim made by the petitioners here, plaintiffs below, was duly and properly raised and was necessary to the decision is made evident by the decision of the Supreme Court of the State of Utah. It was by the Supreme Court of Utah held that because the life of the corporation was extended the law changing the vote required to amend the articles of incorporation and the enactment of the law permitting an incorporated irrigation company to purchase stock in another similar corporation became a part of the articles the same as if written into the articles. (R. 72-73). The Supreme Court of the State of Utah also held that it was immaterial whether the petitioners here, plaintiffs below, did or did not derive any benefit from the purchase of additional water. That in either event the stock in respondent company might lawfully be assessed to pay for the additional water. (R.

76-77). In this connection it may be observed that the authorities relied upon by the Supreme Court of the State of Utah involved legislative enactments where the State itself had an interest involving the relation of the State to the corporation. In this case private, not public, interests are involved. In this case no claim is made that all of the stockholders of respondent company voted to extend the life of respondent company. If a majority of the stockholders of a company may not bind the minority stockholders by directly amending the articles of a corporation, resulting in the impairment of the contract contained in such articles, it is difficult to see how the majority may accomplish that result by the process of extending the life of the corporation. So also is it difficult to see wherein the Provo River Water Users' Association, an agency of the Federal Government, is similar to the respondent company.

We are mindful that this Court is bound by the construction placed upon a State statute by the highest court of the State, however under the doctrine announced in the cases heretofore cited it is the province of this Court to determine for itself whether it will or will not follow the conclusion reached by the State Court as to the question of whether a contract has or has not been impaired by legislative enactment. If the effect of the legislative enactment results in the taking of property without due process of law or denies the equal protection of the law, such fact under the authorities heretofore cited would seem to be of controlling importance.

To avoid repetition we shall discuss this phase of the case under the following heading:

POINT III.

While this Court has repeatedly held that it is only legislative impairment of a contract that falls within the provisions of Article I, Section 10 of the Constitution of the United States, such limitation does not apply to the provisions of the Fourteenth Amendment to the Constitution

of the United States which prohibits any State from depriving any person of property without due process of law or denying to any person the equal protection of the law. The action of State courts, as well as legislative action, falls within the protection of the Fourteenth Amendment.

> Great Northern Railway Company v. Sunburst Oil & Refining Company, 287 U. S. 358; 53 S. Ct. Rep. 145; 71 L. Ed. 360.

In their complaint filed in the fourth judicial district court of Utah, petitioners here, plaintiffs below, alleged that they had sufficient water with which to irrigate their lands, and that they would derive no substantial benefit from the purchase of additional water (R. 14-15). Also that their stock would be assessed to pay for the cost and expense of the purchase of the additional water and the maintenance of the water works. (R. 15). Evidence was offered to support these allegations. (R. 61). The offered proof was rejected by the trial court. (R. 61). Error was assigned because of such refusal. (R. 69). The Supreme Court held that it was immaterial whether petitioners here, plaintiffs below, did or did not derive any benefit as a result of the purchase of additional water. (R. 77).

A petition for rehearing was filed (R. 81-82). A written brief and a reply brief was filed in support of the petition for rehearing, in which it was urged that if, as the court found, the law passed after the incorporation of respondent company became a part of its articles of incorporation by reason of the extension of the life of the corporation, by the same token the law requiring the water to be purchased appurtenant to specified lands became a part of the articles of incorporation; thus the proceedings had in the trial court and the Supreme Court of the State of Utah were sufficient to raise the question of the claim that the petitioners here, plaintiffs below, will be deprived of their property without due process of law if the proposed

contract is executed and enforced, finds support in the case of

Gregia v. Modesto Irrigation District, 164 U. S. 179.

In that case, as in this, reliance was had on

Article I, Section 10 of the Constitution of the United States.

In that case as in this, the real controversy was that the operation of a statute would deprive the complainant of property without due process of law, and in that case, as in this, there was a provision for testing the validity of the proceedings. This Court held that it would look to the real matter in dispute and that a Federal question was presented.

POINT IV.

Much of what we have already said in the light of the provisions of the laws of the State of Utah is applicable when viewed in the light of the acts of the Congress of the United States. It will be seen that the provisions of the Reclamation Act (32 Stat. 388), the Warren Act (36 Stat. 905) and the Act approved August 11, 1916 (39 Stat. 506) make the same requirements as do the laws of the State of Utah, namely, that the water shall be appurtenant to land; the beneficial use shall be the measure and the limit of the right to water, and that the cost of constructing and maintaining Federal irrigation projects must be equitably apportioned by the Secretary of the Interior.

These Acts are expressly mentioned in the contract which the respondent company proposes to enter into with the Provo River Water Users' Association. The respondent company agrees and obligates itself to distribute the water as required by these Federal laws. If the water to be purchased is distributed according to the Federal law, the petitioners here, plaintiffs below, may derive no benefit

from the additional water, or if they should use the additional water they will lose the water which they presently own. This claim was made by the petitioners here, plaintiffs below, in both the trial court and the Supreme Court of the State of Utah, and such claim was made in the trial court and Supreme Court of the State of Utah, in that if the proposed contract is enforced, including a compliance with the Acts of Congress, the petitioners herein, plaintiffs below, will be deprived of their property without due process of law and denied the equal protection of the law.

POINT V.

The plan whereby the respondent company proposes to purchase additional water is essentially a contract with the United States, although nominally such contract is with the Provo River Water Users' Association. To characterize the water to be purchased as shares of stock in the Provo River Water Users' Association does not remove the transaction from the necessity of compliance with Federal law, nor does the fact that the proposed contract requires the respondent company to comply with the Federal law have any effect. The proposed contract when read in the light of the Acts of Congress requires among other things the following:

The Company must make the water to be purchased appurtenant to specified lands. That may be done in one of two ways. Either by contract with the landowner or by the formation of an irrigation district, and when the district is so created, allotments of water may be made to the land within the district as provided by

Chapter 68, Laws of Utah, 1919, as Amended by Chapter 68, Laws of Utah, 1929.

In either event the assessments for the payment of the construction and maintenance cost of the project constructed for the purpose of furnishing water must

be apportioned equitably; that is, in proportion to the benefits to the land to which the water is made appurtenant.

Act of June 17, 1902, Chapter 1903, Section 8, 32 Stat. 388, Act Approved August 11, 1916, Chapter 319, Section 2 Thereof, 39 Stat. 506.

The Federal law requires and the defendant company obligates itself to put the water to a beneficial use, therefore petitioners being already supplied with sufficient water to take care of their needs with the water represented by their presently owned shares of stock in respondent company, the purchased water must be used by others. So also, the payment of the price of the water to be purchased must be paid for by levying assessments on the stock of the stockholders of the Company.

As will be seen from an examination of the articles of the Company there is no other way of securing the necessary money with which to pay the purchase price of the water and the maintenance of the irrigation works. (R. 12). The assessments on the stock must be equal and uniform.

R. S. U. 1933, 18-4-7.

So also, respondent company, under the proposed contract, obligates itself to pay not only for the water to be purchased by it, but also for water in an amount not to exceed $53,200, occasioned by the default of other subscribers. (R. 57-58). Moreover, the respondent company under the proposed contract agrees to execute a mortgage upon all its property as security for the payment of its obligations under the contract. (R. 59).

In his concurring opinion Mr. Justice Wolfe indicates that he entertains doubts about the power of the respondent company to do what is being attempted without the consent of all the stockholders, but apparently yielded to the opinion of his associates, because unless the majority of

the stockholders could bind the minority, those who need water would be unable to secure the same. The soundness of the view that a majority should be permitted to bind the minority because otherwise the majority may be deprived of the opportunity to purchase additional water may well be open to question, but in any event, so far as is made to appear, there is no reason why those who desire additional water may not purchase the same. If a landowner desires more water there is no apparent reason why he may not purchase one share of water in the Provo River Water Users' Association for each acre foot per annum of water he may deem necessary to properly supply his needs.

The plan here attempted in its final analysis means that the landowners who already own sufficient or nearly sufficient water to supply their needs must in effect purchase or, more accurately, pay for the purchase of additional water without regard to their needs, with the result that they are required to pay for that which the laws of the State of Utah and the Acts of Congress and the proposed contract expressly prohibit them from owning. If perchance they could continue to utilize the additional water, still those stockholders who are in need of additional water would not under the proposed contract be able to secure the same unless it be held that those who pay for water which they cannot beneficially use must permit those who can put the purchased water to a beneficial use to use the same without paying therefor.

Thus the inevitable result that will follow from the enforcement of the proposed contract will be that these petitioners, plaintiffs below, will be denied their rights and immunities under the Acts of Congress above referred to, in that they will be required to pay for water that they cannot beneficially use, that is not appurtenant to their

lands, and that they have not consented to purchase. Such claim was duly made in the trial court and the Supreme Court of the State of Utah, and presents a Federal question reviewable by this Court, namely, does the proposed contract and its enforcement offend against the provisions of the Reclamation Act, the Warren Act and Acts of Congress supplementary thereto and Acts amendatory thereof?

Murdock v. City of Memphis, 20 Wall (U. S.) 590; 22 L. Ed. 429.

California Bank v. Kennedy, 167 U. S. 362; 17 S. Ct. 831; 42 L. Ed. 198.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari and that thereafter upon granting said writ this cause be reviewed and the decision of the Supreme Court of the State of Utah be reversed.

Respectfully submitted,

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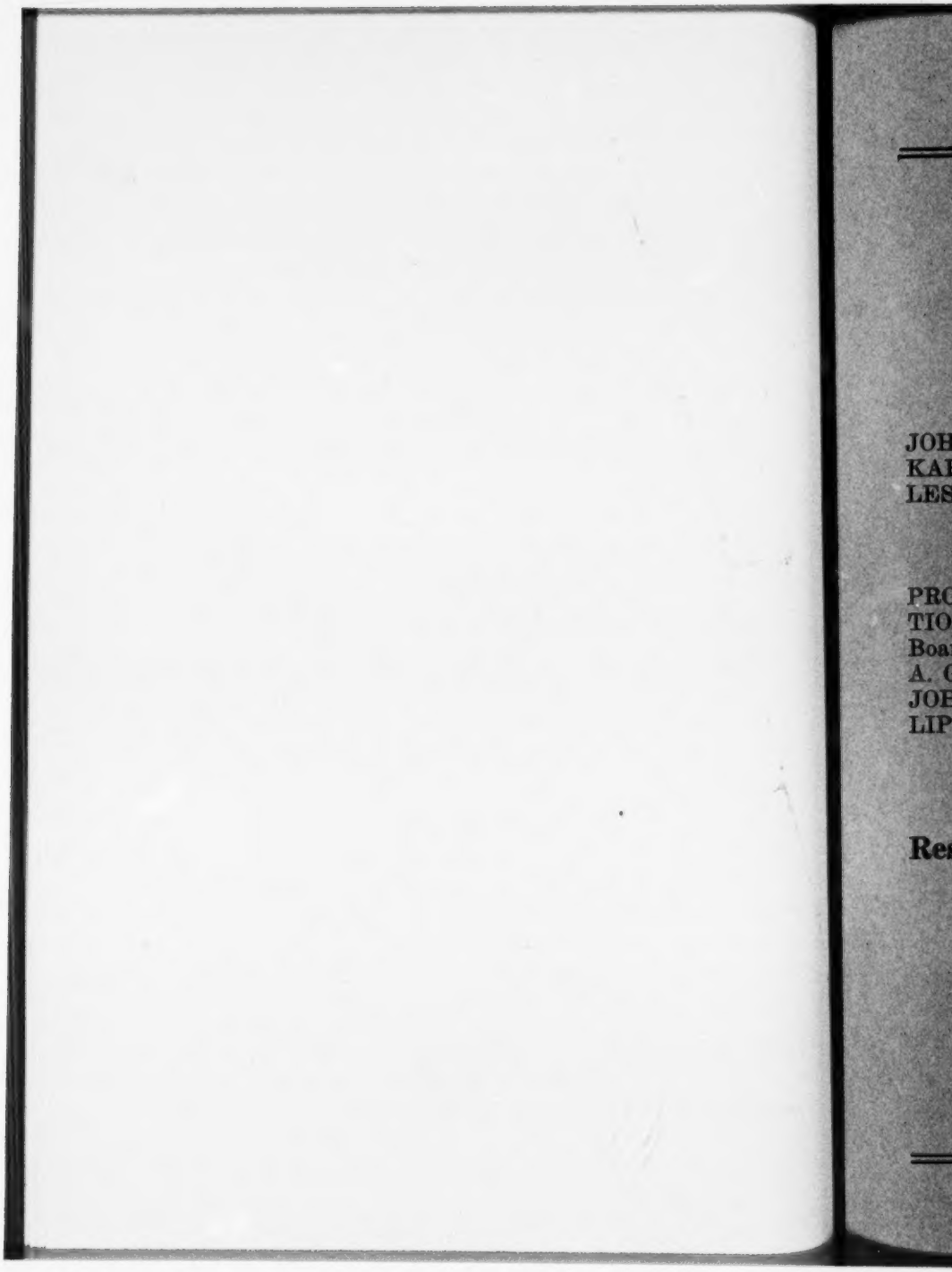

No. 825

APR 5 1941

CHARLES ELMORE CROPLEY
CLERK

The Supreme Court of the United States

OCTOBER TERM, 1941

JOHN FOWER, W. J. CORDNER, M. E. KARTCHNER, JR. and RAY E. LOVELESS,
Petitioners and Plaintiffs Below,

— vs —

PROVO BENCH CANAL AND IRRIGATION COMPANY, a corporation, and its Board of Trustees, RAY V. WENTZ, A. G. KEETCH, LEONARD WALKER, JOHN STRATTON, EMERY McKELLIP, NIELS ANDERSON and A. LOWE,
Respondents and Defendants Below.

Respondents' Brief in Opposition to Granting Writ of Certiorari

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SHIRLEY P. JONES,
Counsel for Respondents.

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Respondents and Defendants Below.

Respondents' Brief in Opposition to Granting Writ of Certiorari

TO THE HONORABLE CHARLES EVANS HUGHES, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your respondents respectfully show:

STATEMENT OF CASE

In the main, respondents are in accord with petitioners' statement of the case. However, a summary of the facts believed by us to be pertinent and an elimination of

extraneous matter may present a clearer picture of the fact situation involved.

The respondents will be hereinafter referred to as the company, since the individual respondents are merely trustees of the defendant canal and irrigation company.

The company was organized under the laws of the Territory of Utah, February 26, 1887, (R. 39.) The Articles with reference to the powers and objects of the company provided as follows:

> "Second: That the object of said corporation shall be to convey water from Provo River to Provo Bench and lands adjacent thereto and to regulate and control the same for the purpose of irrigation." (R. 3, 40)
>
> "Sixteenth: The capital stock of said corporation consists of a canal known as the Provo Bench Canal, running from Provo river at the mouth of Provo canyon to and on Provo Bench, a distance of three miles, more or less, and is from twelve to sixteen feet wide, and all rights to the use of water flowing therein. And the amount of interest which each party to this agreement owns in said canal and in the rights to the use of said water is represented in the amount placed opposite their respective names in the following list. And the said property having been this day conveyed by valid deeds by the undersigned, is hereby accepted in full payment of eighty per cent, of the amount subscribed by each of the parties hereto." (R. 4, 42)

The capital stock was $45,600.00 divided into shares of $30.00 each, or 1520 shares and the corporation was to exist for the term of 25 years. (R. 41) The company was composed of a large number of individual land owners who conveyed to the company their water rights in exchange for stock entitling them to the use of said water. (R. 5)

There was and is no provision in the Articles of Incorporation of the company relative to the manner of amending the same, and as the statute in force at the time of the organization of the company provided that corporation articles could be amended by vote of at least two-thirds of the outstanding stock, such provisions became effective with respect to the company at that time.

The laws of the Territory of Utah at the time of the organization of the company in 1887 and prior thereto reserved the right to modify, alter and amend the law under which corporations were organized.

In the Compiled Laws of Utah, 1876, which compilation was approved and adopted by the Legislature of the Territory of Utah February 22, 1878, Section 21, Chapter 4, Page 232, it is provided:

> "The Governor and Legislative Assembly may hereafter modify or repeal this act; but if it be repealed or if the franchise of any corporation organized under this act shall be forfeited, the corporation may continue for the purposes specified in Section 9 of the act, to which this is an amendment."

Also, in chapter XLV of the Laws of Utah, 1884, being an act compiling and amending the laws relating to corporations, and specifying various amendments that might be made, it provided:

> "The Articles of Agreement or Incorporation may be otherwise changed or amended; provided, such amendment does not alter the original purpose of the incorporation."

These provisions and others relating to the reservation of the right to amend corporate charters were carried forward into the Revision of 1888, where it was provided in

Volume 2, Chapter 3, relating to irrigation companies, entitled "An Act Compiling the Laws Relating to the Incorporation of Irrigation Companies" on Page 54, it is, among other things provided:

> "Nothing in this act shall be so construed as to interfere with the right of the Legislative Assembly to repeal, alter or amend the same at pleasure."

These and similar provisions with respect to the reservation of the right to alter, amend or repeal the law relative to corporation, have been carried forward into every revision and/or compilation of the laws of the Territory of Utah, and into the laws of the State of Utah, after its admission to the Union in 1896; and making it doubly clear that these rights were reserved, the Constitution of the State of Utah, in Article XII, Section 1, provides:

> "Corporations may be formed under general laws which shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the Legislature and all corporations doing business in this state may as to such business be regulated, limited, or restrained by law."

Section 2 of Article XII required the acceptance of the provisions of the Constitution by all existing corporation. The record is silent as to any formal acceptance by the company, but since it continued business, its acceptance must be presumed.

Throughout the years various amendments were made to the Articles of Incorporation.

On January 8, 1910, Article 4 was amended to extend the life of the corporation to fifty years, or until February 26, 1937, (R. 42, 43), and on the 9th day of January, 1937,

Article 4 was amended to extend the life of the corporation one hundred years from and after the 26th day of February, 1887, (R. 44). These are all the amendments with reference to the renewal of the charter and all were made after the Constitution of the State was adopted.

At the time of the incorporation of the company, the general laws of the Territory with respect to the assessments of the fully paid up capital stock provided:

> "Any person who is the holder of fully paid up capital stock, shall not be liable for any assessments or for any indebtedness of the corporation, otherwise than the sale of his or her stock, as herein provided, unless distinctly provided for in the Articles of Incorporation, which Articles of Incorporation shall not be changed in this respect without the consent of all the stockholders in writing."

This remained the law of the Territory and has remained the law of the State up to the present time.

Assessments up to ten per cent were permitted by statute at the time of the organization of the company. Gary, et al, vs. York Mining Company, et al, 9 Utah, 464; 35 Pac. 494.

Other amendments have been made to the Articles of the company; on January 8, 1910, the capital stock was increased $180.00 or six shares;

On November 11, 1922, the capital stock was increased to $90,000.00, divided into three thousand shares with the par value of $30.00 per share, (R. 43), or practically double the original capitalization.

With reference to stock assessments, on June 17, 1914, the Articles were amended by adding Article 3½, limiting the assessment upon the stock to $3.00 per share per year. (R. 43)

All these amendments were duly certified to the Secretary of State and Certificates of Amendment issued in due form.

The above includes all the amendments made to the Articles of Incorporation of the company prior to May 7, 1938.

When the life of the corporation was extended in 1937, the general laws of the State of Utah permitted amendments to be made in the Articles of Incorporation by a majority vote of the outstanding stock. Section 18-2-44, Revised Statutes of Utah, 1933, (this statute will be quoted in full hereafter in the brief).

On May 7, 1938, the outstanding capital stock of the company was 1954 shares, (R. 10), and on that date at a regularly called and held meeting of the company stockholders, 1028.89 shares of stock were voted in favor, and 660.93 were voted against the adoption of a resolution authorizing the Board of Trustees of the company to subscribe for 2000 shares of the capital stock of the Provo River Water Users Association for the purpose of acquiring an adequate supplementary water supply for the irrigation of lands of the company stockholders from the United States Deer Creek Project in Provo Canyon, Utah, (R. 44, 45); that at the same meeting 1029 shares of stock were voted in favor and ½ share was voted against the adoption of a resolution amending Article 2 of the Articles of Incorporation of the company to enlarge the purposes of the corporation, (R. 45, 46), and to amend Article 3½, so that the capital stock should be assessable for any and all corporate purposes. (R. 47)

It is these last amendments to which petitioners object and which they contend impair their contract with the company.

Nothing in this case discloses any reason for this Court to entertain or grant a Writ of Certiorari herein.

POINT A

The Supreme Court of the State of Utah in its decision in this case has determined that there are no violations of either State or Federal Constitutions involved herein. In making this decision no Legislative Act was construed or interpreted. No question concerning the impairment of a contract arises under the Supreme Court decision in this case.

POINT B

If any Federal question is raised in the Petition for a Writ of Certiorari, the same was not timely presented either to the trial court or the Supreme Court of Utah, and in no event is there presented a Federal question.

ARGUMENT

POINT A

The Supreme Court of the State of Utah held that by the amendment to the Articles of Incorporation in 1937 extending the life of the charter to one hundred years, the company in effect sought and obtained a new charter at that time and that hence the Constitution and laws then in force formed a part of the contract between the corporation and the stockholders, (R. 72, 73, citing supporting cases).

Having declared that the laws in force at that time became a part of the charter, the Supreme Court expressly determined that, because the Articles contained no provision for their amendment, the charter at the time of the amendments in 1938, adopted Article XII, Section 1, of the Constitution heretofore set forth in the statement of Case, and the provisions of Section 18-2-44, Revised Statutes of Utah, 1933, which read as follows:

"The articles of incorporation of any corporation

now existing or that hereafter may be organized under the laws of this state may be amended in any respect conformable to the laws of this state in such manner and by the vote of such proportion of all or any class or classes of stock as the articles of incorporation may provide; and in case the articles of incorporation do not so provide, by a vote representing at least a majority in amount of the outstanding stock thereof entitled to vote at a stockholders' meeting called for that purpose as prescribed in section 18-2-45; provided, that, if all the stockholders entitled to vote vote in favor of such amendment at any meeting of the stockholders, the notice required by section 18-2-45 need not be given; and provided further, that the original purpose of the corporation shall not be altered or changed without the approval and consent of all the outstanding stock, but the adding to the purposes or object or extending the power and business of the corporation shall not be deemed a change of the original purpose of the corporation; provided further, that no amendments shall be made which shall have the effect of reducing or authorizing the reduction of the capital, subscribed or paid in, of the corporation to an amount less than fifty per cent in excess of the indebtedness of the corporation; and provided further, that the personal or individual liability of the holder of full-paid stock for assessments or for the indebtedness or obligations of the corporation shall not be changed without the consent of all the stockholders."

Hence the amendments adopted in 1938, required only a majority vote which they secured, and no impairment of any contract occurred.

No violation of Article I, Section 18 of the Constitution of Utah or of Article I, Section 10 of the Constitution of the United States, nor is any legislation subsequent to

1937, involved in this case, (R. 78).

The Supreme Court merely declared the law of this state upon a local question—that when a corporation seeks and obtains an extension of the life of its charter, under the law, it in effect obtains a new charter.

The petitioners and plaintiffs contended in the Supreme Court that the amendment of 1938 to Article 2 altered the purpose of the original corporation in violation of the statute. The statute, however, 18-2-44, supra, written into the new charter, provided, "The adding to the purposes or object or extending the power and business of the corporation shall not be deemed a change of the original purpose of the corporation."

In its decision herein the Supreme Court determined that the amendments of 1938 to Article 2 did not alter the original purpose but were a valid adding to or extension thereof. This decision was merely a declaration of local law, (R. 74, 75).

No Constitutional question was here involved. The amendment in 1938 to Article 3½ gives the power to levy assessments for any and all corporate purposes. This was likewise passed by a majority of the outstanding stock.

Section 18-2-44, Revised Statutes of Utah, 1933, supra, further provides:

> " - - - - that the personal or individual liability of the holder of full-paid stock for assessments or for the indebtedness or obligations of a corporation shall not be changed without the consent of all the stockholders."

In Weede v. Emma Cooper Company, 58 Utah, 524; 200 Pac. 517, the Utah Supreme Court held that stock could be made assessable by a majority vote and that the personal and individual liability specified in the statute is such a liability as may be enforced by a personal judgment

and does not prevent amendments to the Articles of Incorporation to provide for assessments against the stock owned by the stockholder.

This provision and its interpretation were likewise written into the new charter of 1937. Hence, there was no impairment of any contracts by any of these amendments of 1938, and no legislation enacted subsequent to the charter is involved.

The only specific Constitutional violation charged by the plaintiffs in the trial court are found in paragraph XXIV of their complaint, (R. 15), and paragraph 1 of their reply, (R. 29), which charged impairment of contractual obligations. Under the decision of the State Supreme Court no contractual obligations were violated. No Federal question is involved.

This Court will not review the question of whether or not the Supreme Court of Utah has misconstrued a State statute. King v. West Virginia, 216 U. S. 92; 30 Sup. Ct. 225; 54 L. Ed. 396.

If merely construction of a State statute is involved, the writ of error will not lie. Dower, et al, v. Richards, et al, 151 U. S. 658; 38 L. Ed. 305; 14 Sup. Ct. 452; Union Pacific R. Co. v. Callaghan, 161 U. S. 91; 40 L. Ed. 628; 16 Sup. Ct. 493; Egan v. Hart, et al, 165 U. S. 188; 41 L. Ed. 680; 17 Sup. Ct. 300.

The record must show affirmatively that a Federal question is involved. Mere assertion not sufficient. Fowler v. Lamson, 164 U. S. 252; 41 L. Ed. 424; 17 Sup. Ct. 112.

A decision on question of compliance with a State Constitution or statute does not involve a Federal question. Powell v. Supervisors of Brunswick County, 150 U. S. 433; 14 Sup. Ct. 166; 37 L. Ed. 1134.

The scope and effect of a state judgment is peculiarly a question of state law and therefore a decision relating to

such subject involves no Federal question. Kenney v. Craven, 215 U. S. 125; 30 Sup. Ct. 64; 54 L. Ed. 122.

Petitioners and plaintiffs apparently concede under Point 3, page 55, of their brief herein that there is no violation of the provisions of Article I, Section 10 of the Constitution of the United States, since there is no legislative impairment of a contract involved in this case. However, the following is in point:

> "This clause, (of the United States Constitution) as its terms disclose, is not directed against all impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the state. It does not reach mere errors committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a Federal question." Cross Lake Shooting and Fishing Club v. Louisiana, 224 U. S. 632, 738 40; 56 L Ed. 924, 928; 32 Sup. Ct. 577.

POINT B

In this court the petitioners and plaintiffs assert that the amendments in question of 1938 deprive them of due process of law, the equal protection of law, and are discriminatory in violation of the Fourteenth Amendment to the United States Constitution. These contentions were never presented to the trial court and were presented to the Utah Supreme Court for the first time in the petition for rehearing. It is too late to raise a Federal question for the first time in a petition for rehearing. Consolidated Turnpike Company v. Norfolk & Ocean View R. Co., 228 U. S. 326; 33 Sup. Ct. 510; 57 L. Ed. 857; Rehearing denied 228 U. S. 596; 33 Sup. Ct. 665; 57 L. Ed. 709.

A party who has raised only one Federal question in the State court cannot "come into this court from a state court and argue the question thus raised, and also another not connected with it, and which was not raised in any of the courts below, and does not necessarily arise on the record, although an inspection of the record shows the existence of facts upon which the question might have been raised." Dewey v. Des Moines, 173 U. S. 193; 19 Sup. Ct. 379; 43 L. Ed. 665.

Assignments of error in this court cannot cure the failure of the record in the State court to show the Federal question was there raised and decided. Appleby v. City of Buffalo, 221 U. S. 524; 55 L. Ed. 838; 31 Sup. Ct. 699.

The right, title, privilege or immunity claimed under the Constitution of the United States must be specifically set up or claimed in the court below at the proper time and in the proper way to give this court jurisdiction. People of State of New York ex rel. Rosevale Realty Co. v. Kluner, 268 U. S. 646; 68 L. Ed. 1135; 45 Sup. Ct. 618; Mutual Life Ins. Co. v. Wm. Grew, 188 U. S. 291; 23 Sup. Ct. 375; 47 L. Ed. 480.

Even though petitioners and plaintiffs had raised the question under the Fourteenth Amendment at the proper time, there is no merit in their claims.

The Utah Supreme Court in this case held that the extension of the charter's life in 1937 read into the charter the provisions of Section 100-1-13, Revised Statutes of Utah, 1933 (Laws of Utah 1897) which read as follows:

> "Any irrigation or reservoir company incorporated and existing under the laws of this state may purchase or subscribe for the capital stock of any other similar corporation which at the time of such purchase or subscription shall be or is about to be incorporated; provided, that such purchase or subscription shall be made only when permit-

ted by the articles of incorporation, and such corporations are hereby permitted and authorized to amend their articles of incorporation so as to authorize such purchase or subscription."

Under this section the Articles were amended in 1938 to authorize the purchase of stock in similar corporations.

The petitioners and plaintiffs contend now for the first time, that the Supreme Court should likewise have read into the charter the provisions for the next section, 100-1-14, reading as follows:

> "All water hereafter appropriated for irrigation purposes in works constructed or controlled by the United States shall be appurtenant to specified lands owned or occupied by the persons claiming the right to use the water, so long as the water is used beneficially thereon; provided, that if for any reason it should at any time become impracticable to use water beneficially or economically for the irrigation of any land to which the right may, on application to the state engineer, be severed from said land, and simultaneously transferred to and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rights; and in case of such change, the owner of such water right shall execute and acknowledge a proper instrument of transfer describing therein the land from and to which such water is transferred, which instrument shall be recorded in the county recorder's office of the counties in which the lands are situated."

And as we understand their contention, it is that this water is not appurtenant to the land because the stockholders own the land and the company owns the water right, and that having no use for the water, these petitioners will be

compelled to pay for the water used by other stockholders.

The Supreme Court of Utah in its decision herein expressly held that the individual needs of the stockholders are immaterial, that the will of the corporation is controlling, and that in this case the will was established by a majority vote of the stock. (R. 77) No Federal question is involved here.

However, in re Johnson's Estate, 64 Utah 114; 228 P. 748, (1924) the Utah Supreme Court held that water represented by shares in a mutual irrigation company is appurtenant to land held by the stockholders, and that has always been the law in Utah.

This statute was never involved in this case. Where the 2000 shares to be purchased are to be used is a matter for future determination. The company, however, is buying for the use of its stockholders. If these objecting stockholders do not want this water or cannot use it upon the lands they own, there is no obligation upon them to retain it.

> "If it should so happen that at any particular time the landowner should have more water than he wanted to use on his land, he has the right to sell or assign the surplus or the whole of the water as he may choose." Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 161-163; 41 L. Ed. 369, 389-90; 17 Sup. Ct. 56.

No question of due process is involved, since the petitioners and plaintiffs had full notice and hearing. Standard Oil Co. v. Missouri ex rel. Hadley, 224 U. S. 270; 56 L. Ed. 760; 32 Sup. Ct. 406.

> "The 14th Amendment guarantees that the defendant shall be given that character of notice and opportunity to be heard which is essential to due process of law. When that has been done, the re-

quirements of the Constitution are met, and it is not for this court to determine whether there has been an erroneous construction of statute or common law."

There being no proper Federal question here involved, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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